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poreal realty, it is submitted that it may be divided into separate freeholds by horizontal planes.[17]

If, however, air space is incorporeal, a less desirable, but a possible solution of the principal case is to consider the right to occupy the air as an easement appurtenant to the grantor's adjacent land, analogous to a very extensive right to bridge.[18] However, if there are any sufficient practical reasons why air space should not constitute corporeal hereditaments, they would seem to be of the nature of the considerations which lie back of the policy against novel incidents, and they should be equally fatal to such an easement. If this difficulty were surmounted in favor of the grantor, however, the easement of light here claimed by the plaintiff might well run in equity against the grantor's easement as a servient tenement.[19]

THE POWERS OF CONSTITUTIONAL CONVENTIONS. — What is the nature and power of a constitutional convention? What is its relation to the other branches of government? May the legislature limit the powers of the convention? Can the courts enforce such restrictions? [1] These questions are suggested by the decision of the Louisiana Supreme Court in *Foley* v. *Democratic Parish Committee*, 70 So. 104 (La.).[2] In that case clauses in a new constitution, enacted by a constitutional con-

[17] See HAZELTINE, LAW OF THE AIR, 79. Horizontal division of realty was unknown in the Roman law, and rights in a horizontal stratum were regarded as a servitude upon the fee. See HAZELTINE, op. cit. 74; 51 Sol. J. 771. The incidents of the *ius superficiarium* were in accord with this conception. See 4 BURGE, COL. & F. LAWS, 336.

[18] An easement carries with it all subsidiary easements necessary for its enjoyment. See GALE, EASEMENTS, 8 ed., 492–494. In the present case, then, whether the easement or the better fee theory be followed, there would be a right to the support of the grantee's building at least before the fire. Such a right is an incident to the ownership of any upper chambers. McConnel *v.* Kibbe, 33 Ill. 175; Keilw. 98, pl. 4; Caledonian Ry. Co. *v.* Sprot, 2 Macq. 449, 450; Harris *v.* Ryding, 5 M. & W. 60, 71; Smart *v.* Morton, 5 E. & B. 30, 47; Dugdale *v.* Robertson, 3 Kay & J. 695, 700. In accord with this are cases holding that one owner can not recover from the other contribution for repairs made on his own part and benefiting the other. Loring *v.* Bacon, 4 Mass. 575; Wiggin *v.* Wiggin, 43 N. H. 561; Ottumwa Lodge *v.* Lewis, 34 Ia. 67. But the upper man must not increase the burden. 1 WASHB., REAL PROP., 6 ed., 18. *Cf.* CODE NAP. 640. The weight of authority is perhaps, that there is no affirmative duty to repair at common law. See Tenant *v.* Goldwin, 6 Mod. 311, 314; 1 Williams' Saund. (ed. 1871) 557, n. 1; TUD. LEAD. CAS. 3 ed., 219; 2 WASHB., REAL PROP., 6 ed., 342; see *contra*, Anon., 11 Mod. 7; Keilw. 98, pl. 4; Cheeseborough *v.* Green, 10 Conn. 318; Graves *v.* Berdan, 26 N. Y. 498, 501. There is such a duty in Scotland. ERSK. INST. (fol. ed.) 357. And in France, where the division of responsibility for the different parts of the house has been worked out with great elaboration. CODE NAP. 664; see 5 Duranton, COURS DE DROIT FRANÇAIS, 385–387; Merlin, REPERTOIRE DE JURIS. tit. Batiment, § 2.

[19] See John Bros. Abergarw Brewery Co. *v.* Holmes, [1900] 1 Ch. 188; Hanbury *v.* Jenkins, [1901] 2 Ch. 401, 422; GALE EASEMENTS, 8 ed., 11.

[1] These questions are of peculiar interest in Massachusetts at the present time, since Governor McCall in his inaugural address, in recommending a constitutional convention to revise the Massachusetts constitution, suggested withholding the Bill of Rights and the articles relating to the judiciary from revision by the convention. THE BOSTON EVENING TRANSCRIPT, Jan. 6, 1916.

[2] Another recent case in Louisiana involves a similar decision. State *v.* American Sugar Refining Co., 68, So. 742. For a statement of the facts of these cases, see RECENT CASES, p. 550.

vention contrary to certain restrictions imposed by the enabling act and popular vote calling the convention, were declared invalid. One must recognize in dealing with this sort of case that any theory must be greatly modified by the difficulties experienced by courts in dealing with the validity of the fundamental law.

Under our system of government it is apparently well settled that the ultimate sovereignty is in the people, in the restricted sense of those who are enfranchised.[3] The power to change the fundamental law — the written constitution — is in them alone.[4] It is this principle which causes the courts to recognize generally the right of the legislature, as the organ of the people, to submit a call for a convention of the people, and to regard such a convention as a valid method of constitution making, although the existing constitution contains no provision to that effect.[5] It is the same idea which leads us to consider with equanimity a revolutionary convention. Such a convention must be distinguished from a constitutional convention, with whose powers this discussion is primarily concerned.[6] The former arises without the law, existing in opposition or succession to the earlier government — a provisional government with unlimited powers. The latter gains its name both because it is its function to revise the constitution and because it is organized under the existing law. In practice, however, the readiness with which a constitutional convention may usurp powers renders the distinction less important as well as less clear.[7]

The theoretical answer to the questions suggested above is furnished by the extent of the convention's lawful powers, a matter much in dis-

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[3] See Penhallow *v.* Doane's Heirs, 3 Dall. (U. S.) 54, 80, 94; 1 BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE, 4 ed., 268. For a very full discussion of sovereignty in its relation to conventions, see JAMESON, CONSTITUTIONAL CONVENTIONS, 4 ed., ch. 2.

Observe the preamble to the Constitution of the United States, "We, the people of the United States, . . . do ordain and establish this Constitution for the United States of America."

[4] See Holmberg *v.* Jones, 7 Idaho 752, 758, 65 Pac. 563, 564. See also Wells *v.* Bain, 75 Pa. St. 39, 46; Commonwealth *v.* Griest, 196 Pa. St. 396, 404, 46 Atl. 505, 508. This seems an inevitable corollary to the proposition that the ultimate sovereignty is in the people. See n. 3.

[5] This seems to be a clearly settled rule in nearly all our jurisdictions. See DODD, REVISION AND AMENDMENT OF STATE CONSTITUTIONS, 44; Collier *v.* Frierson, 24 Ala. 100, 108; Wells *v.* Bain, 75 Pa. St. 39, 47. It is also expressly recognized in the earlier of the two principal cases. See State *v.* American Sugar Refining Co., 68 So. 742, 744 (La.). Judge Jameson mentions twenty-seven conventions called in this way without express constitutional authority. JAMESON, 210. The two expressions of a contrary opinion have received much adverse criticism. *In re* the Constitutional Convention, 14 R. I. 649; The Opinion of the Justices, 6 Cush. (Mass.) 573. See JAMESON, §§ 570 *et seq.*; DODD, 45; BRADLEY, THE METHODS OF CHANGING THE CONSTITUTIONS OF THE STATES, ESPECIALLY THAT OF RHODE ISLAND.

[6] For a rather full discussion of the distinguishing characteristics of these two sorts of conventions, see JAMESON, CONSTITUTIONAL CONVENTIONS, 4 ed., §§ 6–17. For a briefer discussion, see Braxton, "The Powers of Conventions," 7 VA. LAW REG. 79–82.

[7] See JAMESON, § 12. It is interesting to note that the Federal Constitutional Convention, which framed our Constitution, exercised revolutionary powers. 1 STORY, COMMENTARIES ON THE CONSTITUTION, 5 ed., §§ 274, 275, 279 n. (*a*). For two recent instances of such action by state conventions, see McKinley, "Two New Southern Constitutions," 18 POL. SCI. QUART. 480, 506–511.

pute. To the leading writer on this subject the convention seems to have but a delegated authority of the strictest sort, a delegation which may be limited either by the people directly or by mere legislation, to be a body in fact subordinate to the legislature.[8] The chief reason offered for such a view seems to be the danger of too much power in a single uncontrolled assembly. The fact that it is generally declared that a convention should always submit its work to the people for approval, unless that is expressly dispensed with, seems to take much of its force from that argument.[9] In addition, the ease with which a convention may usurp power and the difficulty of enforcing restrictions are facts which no theory can fail to recognize. At the other extreme is the theory of conventional sovereignty,[10] which regards the convention as a purely representative body, a body not of delegated powers, but one which, being in substance the people themselves, has all the people's sovereign powers. This theory has been most commonly expressed by members of conventions in session, although it is not without judicial recognition.[11] But a rather better view, less extreme than either of the preceding ones, regards the convention as a regular organ of the existing government coördinate with the other branches.[12] In its sphere of constitution making it should be supreme, subject only to limitation by the people. It should be free from legislative attempt to limit its powers of revision;[13] on the other hand it should probably be subordinate to the legislature in purely legislative

[8] This is the theory running throughout Judge Jameson's book. But see particularly, § 24.

[9] See JAMESON, § 411; DODD, 62–71; LOBINGIER, THE PEOPLE'S LAW, 320–327. Judge Lobingier apparently considers popular ratification an indispensable requirement. He disapproves of giving a convention power to enact a new constitution even by express authority, and characterizes the action of the Virginia convention in enacting without such authority, as "without support in law, logic, or morals." For a discussion of this matter, see LOBINGIER, 301–325; DODD, 68–69. But see Taylor *v.* Commonwealth, 101 Va. 829, 44 S. E. 754.

[10] See JAMESON, § 307. The chief object of his book was to denounce this theory. JAMESON, § 313.

[11] For various expressions of this theory by members of conventions and others, see the text and notes in JAMESON, §§ 308 *et seq.;* Braxton, "Powers of Conventions," 7 VA. LAW REG. 79, 86, 86 n. See also Loomis *v.* Jackson, 6 W. Va. 613, 708; Sproule *v.* Fredericks, 69 Miss. 898; Miller *v.* Johnson, 92 Ky. 589, 18 S. W. 522; Opinion of the Judges of New York (not reported), JAMESON, Appendix D.

[12] A further explanation of the distinctions between these three theories may be desirable. Under the theory of a conventional sovereignty all conventions are really revolutionary; they are above and outside the regular organized government. Judge Jameson emphasizes the distinction between revolutionary and constitutional conventions, since it is only on the ground that their action is revolutionary that he can satisfactorily explain the instances where conventions have ignored restrictions. The third recognizes this distinction, but as of theoretical rather than of practical importance; for whatever may be the rights of conventions its powers are likely to be much in excess of them. This view differs from the theory of conventional sovereignty in that submission to popular vote may be enjoined under it, and that amendments may probably be declared invalid, when they violate binding restrictions.

[13] See DODD, 80; Braxton, "Powers of Conventions," 7 VA. LAW REG. 79, 96. Where the limitations are included in the popular call for a convention, they should probably be binding. If the people initiated the call, this would be clear. But where, as is more usual, the legislature frames the call, this may in substance give the legislature power to restrict. The only way in which the people could avoid such a restriction would be to reject all proposals containing it, and elect a legislature which would submit a proposal without it; a clumsy and inadequate remedy.

matters, as, for instance, in the manner of submitting the constitution to popular ratification. But just where to draw the line is a difficult and much disputed question.[14] In practice this theory may really approach closely to that of conventional sovereignty.[15] But a realization that in exercising certain powers a convention is revolutionary, should induce a greater respect for properly imposed restrictions.

For two reasons the practical results of all these theories are less different than the theoretical. The first is a lack of power in the courts to enforce many limitations on conventional powers; the second is the frequency of an express or implied ratification by the people of acts done in violation of such restrictions. Consider first the power of the courts to deal with a constitution which has been enacted by the convention without submission to popular vote, but has been accepted as in force by the other branches of the government.[16] If the court assumes to declare the whole constitution invalid, maintaining that it is organized under the old, such a proceeding should be entirely futile.[17] There is no organized government under the old constitution and by its hypothesis, the court has disclaimed its authority to bind any government claiming to be organized under the new. Where, as in the principal case, the court apparently admits the validity of the new constitution, but declares part of it invalid, its course seems even less justifiable. In recognizing part of the new constitution it must recognize its complete validity. Since a court cannot attack the fundamental law, it can declare the new constitution invalid only by action under the old. But this can no longer exist,[18] for its existence is hopelessly inconsistent with the validity of the new. For whether it be called a lawful revision or a peaceful revolution, by the enactment of the new constitution the old government has been displaced and a new one substituted. The court is further beset in these cases by the difficulty that this acquiescence by the legislature may amount to a ratification by the people through the organized govern-

[14] Dodd does not consider methods of submission, or submission if that is an open question, as within the power of the legislature. DODD, 87. See also State *v.* Neal, 42 Mo. 119. Judge Jameson of course holds the contrary view. JAMESON, §§ 413–418; Wells *v.* Bain, 75 Pa. St. 39.

[15] See *supra*, n. 7 and 12.

[16] As in the principal cases. ACTS OF LOUISIANA, EXTRA SESSION, 1913, 1. Although apparently of recent development such a provision is no longer unusual. For instances of such provision, see HALL, CASES ON CONSTITUTIONAL LAW, 10 n. 1. But see LOBINGIER, 324. Though much disturbed by such a provision, or by enactment without such a provision, Judge Lobingier fails to suggest any basis for jurisdiction to attack such action.

[17] See *infra*, n. 22. This can only be possible when the old court hangs over; otherwise the contention would be ridiculous. In theory a court might possibly admit it was organized under the new, and then decide that the constitution was invalid. This would involve that it declare itself non-existent. The futility of such a proceeding would seem to render that a highly improbable decision. See Koehler *v.* Hill, 60 Ia. 543, 614, 15 N. W. 609, 614; Miller *v.* Johnson, 92 Ky. 589, 595–7, 18 S. W. 522, 523–4. In fact a court might remain in existence and usurp the power to make such a decision, if the other branches of the government, though organized under the new constitution, would enforce it. It is to be hoped that no clear-thinking court would deliberately do this.

[18] In the principal cases this is especially clear since the new constitution contains an express provision that the earlier constitution is superseded. LA. CONST. 1913, Art. 326.

ment as their agent.[19] If the court recognizes the power of the legislature to bind the convention, it is inconsistent to deny the legislature the power to unloose that bond.[20] If it believe in conventional sovereignty it will, of course, never declare the constitution invalid. If in addition the constitution has been submitted and adopted by popular vote, it would seem that any court which admits that the ultimate sovereignty is in the people must recognize its validity.[21]

But where the convention has merely amended the existing constitution a different question is presented. Here assuming the validity of the restrictions imposed on the convention, a court should have no difficulty in enjoining the submission of an amendment which involves a violation of those restrictions.[22] But if the amendment is submitted for popular approval and is ratified, it seems that that expression of popular will should override any irregularity in violating any restriction not imposed by the constitution itself. If the amendment is merely enacted without submission to popular vote, then unless the acquiescence of the legislature can be construed to be an adoption, its validity may certainly be attacked.[23] A closely related question is whether the valid-

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[19] It was argued in the principal case, and adopted by the dissenting judge as an alternative ground that the submission and rejection of a proposal for a new constitutional convention between the enactment of the constitution involved in the principal case and the date of the principal case, amounted to an express ratification. This does not seem to be sound, since there cannot be said to be any such intention. It must be deemed to be important evidence of popular acquiescence, however. See *infra*.

[20] It is hard to see why this is not a logical result of Judge Jameson's theory. But in fact there is probably not an intention to ratify. Such acquiescence should be of real importance only if we consider the validity of adoption as a political question. See *infra*, n. 24.

[21] Miller *v.* Johnson, 92 Ky. 589, 18 S. W. 522; Secombe *v.* Kittelson, 29 Minn. 555, 12 N. W. 519; Brittle *v.* People, 2 Neb. 98; Loomis *v.* Jackson, 6 W. Va. 613; see the dissent in Ellingham *v.* Dye, 178 Ind. 336, 415, 99 N. E. 1, 29. In the following cases there was no popular ratification. Taylor *v.* Commonwealth, 101 Va. 829, 44 S. E. 754; *contra*, Bradford *v.* Shine, 13 Fla. 393.

[22] It is at this point that the distinction becomes marked between the conventional sovereignty theory and the theory advocated above. There seems to be no reason why submission should not be enjoined if the proposed amendment is invalid. This would seem to be the only proper way in which to attack the validity of such amendments. Such procedure has, however, not been usual. The submission of a new constitution drawn up by a convention has been enjoined. Ellingham *v.* Dye, 178 Ind. 336, 99 N. E. 1. Elections under an ordinance passed by a convention in alleged excess of its powers has been enjoined. Wells *v.* Bain, 75 Pa. St. 39; Woods' Appeal, 75 Pa. St. 59. But in one case an injunction was refused against submission of an amendment proposed by the legislature. People *v.* Mills, 30 Colo. 262, 70 Pac. 322. *Cf.* Threadgill *v.* Cross, 26 Okl. 403, 109 Pac. 558. Notice that there is no difficulty in enjoining ordinary elections held without authority. De Kalb County *v.* City of Atlanta, 132 Ga. 727, 65 S. E. 72; Tolbert *v.* Long, 134 Ga. 292, 67 S. E. 826.

[23] The great weight of authority allows the courts to examine the validity of constitutional amendments, proposed either by a convention or by the legislature, whether or not they have been popularly ratified. In the following cases the courts have declared the amendment invalid. Oakland Paving Co. *v.* Hilton, 69 Cal. 479, 11 Pac. 3; State *v.* Tufly, 19 Nev. 391, 12 Pac. 835; Bott *v.* Wurts, 63 N. J. L. 289, 43 Atl. 744, 881; Koehler *v.* Hill, 60 Ia. 543, 14 N. W. 738, 15 N. W. 609; Durfee *v.* Harper, 22 Mont. 354, 56 Pac. 582; see Collier *v.* Frierson, 24 Ala. 100, 111; *contra*, West *v.* State, 50 Fla. 154, 39 So. 412; The Constitutional Prohibitory Amendment, 24 Kan. 700; *cf.* Worman *v.* Hagan, 78 Md. 152, 27 Atl. 616. In these cases the amendments have been examined although finally held valid. State *v.* McBride, 4 Mo. 303;

ity of adoption is a political or judicial question; a difficulty which can only be pointed out without discussion here.[24] The difficulty of treating it as a judicial question is evidenced by a peculiar doctrine of our law. Courts which declare their power to overthrow an invalid amendment, will refuse to do so if such an amendment has been in force unquestioned for a considerable time.[25] To reconcile these two ideas seems impossible; but the doctrine may indicate that this should more properly be treated as a political question, and that the courts should have no power to overthrow any amendment which the other branches of the government have recognized as valid. These questions seem to bare a weak spot in our governmental system. But it is weaker in theory than in practice. The absence of any definite rule is of little consequence where a few cases arise; it is of even less consequence when those cases are such that the practical results of a decision must and should weigh heavily in making it.

NEGLIGENCE IN THE LAW OF DEFAMATION.—The ghost of malice, many a time laid by text-writers and judges,[1] still returns to plague the courts in suits for slander or libel. In England, since the famous Artemus Jones case,[2] malice is, it is true, no more than a formality of pleading. A late Alabama decision, however, gives the term a more substantial vitality. The publisher of a city directory, through an innocent error, placed an asterisk before the name of the plaintiff, that being the customary mode of designating a negro. The plaintiff, of pure Caucasian blood, brought suit for libel. Conceding the Southern doctrine that it is libelous to call a white man a negro,[3] the court nevertheless denied recovery, on the ground that where published matter, though "calculated to defame and injure another," is not "necessarily libelous," the defendant can rebut the usual presumption of malice by showing that he acted neither recklessly nor with knowledge that the words were libelous. *Jones* v. *R. L. Polk & Co.*, 67 So. 577.

It is one of the results of the unfortunate terminology of the common law of libel that three distinct issues, each susceptible of separate defini-

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People *v.* Sours, 31 Colo. 369, 74 Pac. 167; *In re* McConaughy, 106 Minn. 392, 119 N. W. 408; Lobaugh *v.* Cook, 127 Ia. 181, 102 N. W. 1121; State *v.* Winnett, 78 Neb. 379, 110 N. W. 1113. Whether a sufficient number of votes has been cast to ratify is a judicial question. *In re* Denny, 156 Ind. 104, 59 N. E. 359; Rice *v.* Palmer, 78 Ark. 432, 96 S. W. 396; State *v.* Powell, 77 Miss. 543, 27 So. 927. In the following cases the popular ratification has been held defective. Collier *v.* Frierson, 24 Ala. 100; State *v.* Swift, 69 Ind. 505.

[24] It is apparent that the whole tendency of our courts is to treat this as a judicial question. See cases in n. 23. DODD, 209 *et seq.* Where there is no popular ratification, this seems sound, although that it may lead to difficulties is apparent from the cases cited *infra*, n. 25.

[25] Weston *v.* Ryan, 70 Neb. 211, 97 N. W. 347; Nesbit *v.* People, 19 Colo. 441, 36 Pac. 221; *cf.* Peck *v.* Pease, 18 How. (U. S.) 595.

[1] See especially BOWERS, CODE OF ACTIONABLE DEFAMATION, Appendix II, and cases there cited. Also Jeremiah Smith, "Jones *v.* Hulton," 60 PA. L. REV. 365, 367 ff.

[2] E. Hulton & Co. *v.* Jones, [1909] 2 K. B. 444, [1910] A. C. 20.

[3] Flood *v.* News & Currier Co., 71 S. C. 112, 50 S. E. 637.